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No. 82-489

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY, as Trustee of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts,

Respondent.

REPLY BRIEF ON CERTIORARI FOR PETITIONER TEMORA TRADING COMPANY, LTD.

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I.

STATEMENT OF FACTS

Perry sued Temora in 1977 in Nevada, in an rem action to quiet Temora's title to certain real estate located in Elko County, Nevada. The final, fourth

amended complaint alleged that certain transfers by the bankrupt Boyd O'Donnell, to one James Gleason, were void either 1.) because Gleason was a fictitious person, or 2.) the transfers were not supported by fair consideration.

The complaint did not attack the transfers by Gleason, 1971, to Temora, as fraudulent. Nor did it contend that Temora was the alter ego of Boyd O'Donnell. The reason was clear to everyone, but the Nevada trial court. Perry's rights as O'Donnell's trustee in bankruptcy were fixed at the date of bankruptcy on March 13, 1970. No transfers after that date, even to O'Donnell, would give Perry any claim to the property.

Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966).

Temora, thus chose to answer the case and submit to the jurisdiction of the Nevada trial court. If it did not, it would lose its land through a default, in rem, judgment. It chose to answer since it knew that any and all state and federal statutes of limitation had all expired two years after the date of bankruptcy, pursuant to Bankruptcy Act Section 11(e).

Feldman v. First National City Bank, 511 F.2d 460 (2 CA 1975).

It also knew that Perry had lost in the trial before the Bankruptcy Judge in Los Angeles 1975, in his attempt to prove Gleason was a non-existent person. Thus, Perry was collaterally estopped to try that issue again. In fact, the following colloquy took place between the Bankruptcy Judge and Temora's

counsel, at the conclusion of the trial on June 25, 1975.

> "Mr. Moneymaker: Has there been a scrap, a shred of evidence presented by Mr. Turner (Perry's counsel) that Gleason and O'Donnell are one and the same.
>
> "The Court: No."
>
> (Ex. A p. 114, lines 11-14).

This transcript had been introduced into evidence by Temora as Defendant's Exhibit A.

And again.

> "The Court: Now you're right, Turner has not proved what he promised. He promised in his opening statement that he would prove that Gleason was a fictitious name or that Gleason and O'Donnell were the same. He didn't."
>
> (Ex. A p. 116, lines 11-14.)

With this background, Temora anticipated little difficulty in defending its title, and winning a Motion for Summary

Judgment. When it filed its motion, however, the Nevada trial court denied its motion and then permitted Perry to expand its in rem action to bring in the issue of title to Temora's land in California, over Temora's objection. And when Temora's counsel quite properly sought a reconsideration of these rulings, the Nevada trial judge made the following statement in his written order.

> "Temora's attorney Mr. Richard M. Moneymaker has contended that Plaintiff has no evidence to sustain his cause of actions and that this litigation and the past litigation are pure and simple harassment. The only way for this Court to determine if this is true is by a trial. It will be interesting to see if Mr. Moneymaker has the strength of his own convictions and will go to trial on the merits or whether he will go whining off to the Nevada Supreme Court for a Writ resulting in further delay of the trial on the merits."

This early incredible written slur by the Nevada trial court to Temora's counsel, was only the first of a series of rulings and statements resulting in the present miscarriage of justice.

II.

ARGUMENT

1. Perry's Factual Contentions Are Accusations Only.

In Perry's Statement of the case, he continues his successful trial technique of using accusations and argument in place of evidence. This court must keep in mind that the Nevada trial court granted a default judgment after striking Temora's answer.

No trial ever occurred. Perry has never presented any evidence in support of any of his accusations. Temora has

never had the opportunity of confronting witnesses, objecting to testimony, or exhibits, or of presenting witnesses and evidence on its own behalf. At the hearing upon Perry's Motion for Sanctions and for a Summary Judgment, Perry never offered into evidence any deposition transcripts, any affidavits or any documents. The trial court neither received nor accepted a single exhibit into evidence from Perry.

Nevertheless, a biased and hostile trial judge purported to make extensive "findings of fact" in regard to the motion for summary judgment, which show on their face that there were unresolved issues of fact requiring a trial before an unbiased trier of fact.

Nevada Rules of Civil Procedure 56.

However, even those unsupported, and legally improper findings do not support Perry's present and continued accusations that James Gleason was a fictitious and non-existent person. Findings of Fact No. 1 through 3 clearly find Gleason did exist.

> Petitioners' Appendix C-2 and 3.

Perry did not appeal from that Summary Judgment and those findings are final as to him.

2. Temora Had No Prior History Of Obstructing Discovery.

Perry spends several pages attempting to show that the refusal of Temora's officers to attend the depositions in the Bahamas, because of non-compliance with Bahamian Law, was only the last in

series of obstructive and delaying tactics. This accusation is likewise false. The trial court, prior to this default judgment had never imposed sanctions on Temora. Temora had quite properly, sought protective orders and had raised the attorney-client privilege to much of Perry's discovery efforts. The trial court had sustained Temora in some cases and had overruled Temora on others. When ordered to comply with discovery, however, Temora had always complied to the full extent of its ability. The evidence of this is that the only sanctions imposed on either party, prior to striking Temora's answer, were against Perry. The court assessed him $500.00 in sanctions for failure to properly answer Temora's interrogatories. To compare that sanction to the

striking of Temora's answer demonstrates the uneven treatment practiced by the Nevada trial court.

3. The Nevada Discovery Order Was Void.

Perry had never conducted any discovery on the cause of action which he plead in his complaint. He never sought to examine into the transfers from O'Donnell to Gleason. Rather, with the complete backing of the Nevada trial court, Perry began a series of discovery actions looking into the business transactions of Temora years after the transfers from O'Donnell to Gleason.

Temora, quite properly, resisted, contending they were totally outside the issues of the lawsuit. However, when ordered it did supply the information

requested, that it had. It was never sanctioned by the trial court prior to the Bahama depositions.

Perry had noticed the depositions of Temora's officers in Nassau. Since 1976, Temora was being managed by the Columbus Trust Co. of Nassau. Temora did not know that Perry did not intend to comply with requirements of the Bahamian Banks and Trust Company Regulation Act of 1965, and seek an order for discovery from a Bahamian Court. Temora did know Perry was aware of the Act since it had raised it before the Nevada trial judge, on a prior occassion. It did know Perry had Bahamian counsel, since he needed to associate a Bahamian counsel to conduct his discovery. Only when Temora's counsel arrived in Nassau, did he discovered Perry's scheme.

Perry's counsel indicated he would not seek any order from a Bahamian Court. Temora's counsel then informed Perry's counsel that Temora's officers would not attend, absent such an order. Perry's counsel then telephoned his associate counsel in Elko, Nevada and had secured an ex parte order requiring Temora's officers appearance. Contrary to Perry's statement that order was never served on Temora, its officers or its counsel in Nassau. They had no opportunity to appear and oppose it, or seek a protective order, or even see and discuss it. Under Nevada law, such an ex parte order is void for lack of jurisdiction.

Monroe Ltd v. Central Telephone Co., 91 Nev. 450, 538 P.2d 152 (1975).

Mahew v. District Court, 88 Nev. 26, 49 P.2d 709 (1972).

Farnow v. Dept. 1 of Eighth Judicial District Court, 64 Nev. 109, 178 P.2d 371 (1947).

Perry's counsel informed Temora's counsel that the order had been issued and reset the depositions for the next day. Temora's counsel urged the officers of Columbus Trust Co. to attend the depositions even without an order. They refused. The counsel for Columbus Trust Co. and Temora's counsel then attended the deposition. Temora's counsel announced he had urged the attendance of these witnesses. The Columbus Trust Company's attorney confirmed the fact but announced they would not attend until Perry followed Bahamian legal procedure. Thus the order resulting in the striking of Temora's answer followed the Nevada pattern of no hearing, no opportunity to object, and no evidence.

4. The Nevada Supreme Court Decision.

The Nevada Supreme Court knew that it could not sustain the so-called Summary Judgment portion of the trial court, since the findings showed on their face that there were unresolved issues of fact, requiring a trial. It also realized that the findings mandated a judgment for Temora even if a default judgment was entered, since Findings of Fact 1 through 3 found Gleason existed. If Gleason existed than any other cause of action was barred by the statute of limitations, and under Nevada law, if the bar of the statute appears on the face of the complaint or judgment the court must apply it.

Kellar v. Snowden, 87 Nev. 488, 489 P.2d 90 (1971).

Thus the Supreme Court reversed and disregarded this central finding, despite the fact Perry had not appealed and it was a final judgment as to him. And in an effort to bolster its conclusion that Temora and its counsel had been obstructing discovery, it cites Seligman's deposition even though that deposition was never offered or received into evidence and quotes testimony that is obviously opinion and conclusionary, and not admissible into evidence even if offered.

Thus the Supreme Court of Nevada makes a crucial finding a contested issue of fact, to wit; that false answers had been given to written interrogatories, without hearing or evidence. Not even the trial court had found Seligman's opinion was admissible or had

based any finding or decision upon these statements.

The only comment the trial court made on the crucial point of the applicability of the Bahamian privilege, was to suggest Temora's counsel really didn't urge their appearance.

Petitioner's Appendix C-15.

There was again no hearing, no evidence and no testimony taken on Temora's good faith assertion of the Bahamian Bank & Trust Companies Regulation Act.

Finally, the default judgment quieted title to all of Temora's property including property which Gleason had never even received from O'Donnell. The trial court required no prove-up despite the fact it had acquired some assets from persons other than O'Donnell.

SUMMARY

Temora has received a civil "lynching" in the Nevada court system resulting in confiscation of its real estate in not only Nevada but also California. It has never received its day in court, and Perry has never been required to produce any evidence to support his charges. In the one case the matter went to trial, Perry lost totally on all points as demonstrated by the decision of the Ninth Circuit Court of Appeal.

Petitioner's Appendix D.

Dated: November 18, 1982.

Respectfully submitted,

Richard M. Moneymaker

Attorney for Petitioner